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to infer that Congress did not intend entirely to exclude proof of contingent debts, since the Act makes express provision for the liquidation of unliquidated claims against the bankrupt,¹⁵ and for the proof of a debt by a surety of the bankrupt in case the creditor fails to prove it.¹⁶

The unsatisfactory condition of the law on this subject might have been avoided by adopting the provisions in the present English Bankruptcy Act,¹⁷ which provide in the broadest possible language for the valuation and proof of contingent claims of every description. Under it the bankrupt is discharged from every liability, unless the claim is submitted for proof and declared by the court to be incapable of valuation.¹⁸ This accomplishes, as nearly as is possible, what should be the principal objects of bankruptcy legislation; namely, to relieve the debtor of every existing liability, and to enable as many creditors as possible to receive dividends.

RECENT CASES.

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY OF AGENT FOR REFUNDING MONEY DUE THIRD PERSON. — The plaintiff sent to the defendant for collection a check which had been fraudulently drawn on the A bank by A's cashier, as the plaintiff probably knew. The A bank paid the check, but shortly afterward, on discovering the fraud, demanded back the money, and the defendant repaid it. *Held*, that the defendant is liable to the plaintiff for the amount repaid. *Monongahela Nat. Bank v. First Nat. Bank*, 75 Atl. 359 (Pa.).

If an agent receives money or property for his principal, he is generally estopped to deny his principal's title. *Roberts v. Ogilby*, 9 Price 269. This is true even if it in fact belongs to a third person, who could have demanded it back from the principal, for an agent is not allowed to set up a *jus tertii* unless the right has been asserted against him. *Day v. Southwell*, 3 Wis. 657. But if, upon demand, he holds the property for the true owner, or returns it to him, he has a good defense against his principal. *Biddle v. Bond*, 6 B. & S. 225; *Robertson v. Woodward*, 3 Rich. (S. C.) 251. For a refusal to surrender to the true owner on demand would be a conversion by the agent. *Doty v. Hawkins*, 6 N. H. 247. In the principal case, as the plaintiff probably knew of the cashier's wrongful act, he would not be entitled to recover or retain the money as against the A bank. *Stainback v. Bank of Va.*, 11 Gratt. (Va.) 269; *Amidon v. Wheeler*, 3 Hill (N. Y.) 137. Accordingly the decision seems erroneous, in denying to the agent a justification for refunding to the aggrieved bank.

ATTACHMENT — EFFECT OF LEVY BY MORTGAGEE ON MORTGAGED PROPERTY. — A chattel mortgagee attached the mortgaged goods, which were in the possession

would be required than under the earlier acts. See *In re Pettingill & Co.*, 137 Fed. 143.

¹⁵ § 63 b.

¹⁶ § 67 i. This section, however, merely insures to the surety that the original debt will be proved against the bankrupt. It does not enable him to prove his contingent claim on the bankrupt's implied contract of indemnity; and unless he can do so under § 63, the bankrupt is liable on it after his discharge. *Smith v. McQuillin*, 193 Mass. 289.

¹⁷ ACT OF 1883, 46 & 47 VICT. c. 52, § 37. This substantially follows the ACT OF 1869, 32 & 33 VICT. c. 71, § 31.

¹⁸ *Fothergill v. Hardy*, 13 App. Cas. 351. If the court decides that the claim is not capable of valuation, it is not provable and therefore not discharged. *Robinson v. Ommanney*, 23 Ch. D. 285.

of the mortgagor. Later the attachment was dissolved. An action was subsequently brought to foreclose the mortgage. By the state statute a chattel mortgagee has merely a lien. *Held*, that the right of foreclosure is not lost by the attachment. *Stein v. McAuley*, 125 N. W. 336 (Ia.).

Under the common-law view that a mortgagee has legal title to the mortgaged property, and that the equity of redemption cannot be attached, a mortgagee waives his title by levying on the property. *Evans v. Warren*, 122 Mass. 303. Since a man obviously cannot attach his own property, the mortgagee is taking a position inconsistent with his rights as legal owner, and the necessary inference is that he is thereby electing to give up his title and rely solely upon the attachment. But in jurisdictions where a mortgagee has only a lien, any creditor of the mortgagor can attach the property and hold it subject to the mortgage. *Beach v. Derby*, 19 Ill. 617. Hence if the mortgagee himself attaches he is not taking a position inconsistent with the continuance of his mortgage lien, and the principal case seems clearly correct in holding that there is no waiver. The decisions involving the same facts are in accord. *Barchard v. Kohn*, 157 Ill. 579.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — TITLE TO PARTNERSHIP ASSETS WHEN SURVIVING PARTNER IS ADJUDGED BANKRUPT. — One of two partners died. Thereafter the survivor was individually adjudged a bankrupt. *Held*, that title to the firm assets vests in the trustee in bankruptcy. *Hewitt v. Hayes*, 90 N. E. 985 (Mass.).

Under section 5 of the Bankruptcy Act of 1898, a partnership may be adjudged bankrupt, though its members are not. *In re Sanderlin*, 109 Fed. 857. Since this act treats a partnership as an entity, putting all the partners into bankruptcy no longer has a like effect on the firm. *In re Mercur*, 122 Fed. 384. If, however, a surviving partner takes absolute title to partnership assets, that title would vest in his trustee in bankruptcy. This view of his ownership is plausible, since it has been held that an allowance may be made to his widow from partnership assets, and that debts due from an individual partner may be set off against a claim by him as surviving partner. *Bush v. Clark*, 127 Mass. 111; *Holbrook v. Lackey*, 13 Met. (Mass.) 132. The better view, however, is that he holds as a fiduciary. *Farley, Spear & Co. v. Moog*, 79 Ala. 148. The rule that a surviving partner may not pay his individual debts with firm assets supports this theory. *Gable v. Williams*, 59 Md. 46. The fiduciary character of the surviving partner is even more clear if the partnership may correctly be regarded as an entity. When the firm is bankrupt but the partners are not, it is conversely held that the trustee cannot administer the separate estates of the partners. *In re Berlinshaw*, 157 Fed. 363. *Contra*, *In re Meyer*, 98 Fed. 976.

BANKRUPTCY — PROVABLE CLAIMS — CONTINGENT DEBTS UNDER THE BANKRUPTCY ACT OF 1898. — The defendant, after receiving a discharge in bankruptcy, was sued as accommodation indorser of a promissory note, which he had indorsed before the filing of the petition, but which did not fall due until afterwards, though within the time allowed for the proving of claims. *Held*, that the defendant's liability on the indorsement was a provable debt, and was therefore extinguished by the discharge in bankruptcy. *Cohen v. Pecharsky*, 121 N. Y. Supp. 602 (Sup. Ct.). See NOTES, p. 636.

BANKS AND BANKING — COLLECTIONS — LIABILITY FOR DEFAULT OF SUB-COLLECTING AGENT. — The A Bank, the indorsee of a note, gave it to the B Bank for collection, agreeing that the latter should be liable only for negligence in choosing its correspondents. The B Bank forwarded to the C Bank which in turn forwarded to the D Bank. The D Bank forwarded to the E Bank which negligently failed to present for payment, whereby the indorser was released. The maker was insolvent. The A Bank sued the D Bank. *Held*, that the D